Supreme Court, U.S.
FILED
OCT 15 1996
CLERK

No. 96-380

In The

Supreme Court of the United States

October Term, 1996

MORTON BARRY,

Petitioner,

v.

BURDINES AND THE TRAVELERS,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Florida

BRIEF IN OPPOSITION

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15 pp

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OPINIONS BELOW

Petitioner seeks review of the Florida Supreme Court opinion *Barry v. Burdines,* 675 So.2d 587 (Fla. 1996). The opinion of the Florida First District Court of Appeals is *Barry v. Burdines,* 667 So.2d 241 (1st D.C.A. 1995). These opinions and the unpublished order of the Judge of Compensation Claims are reprinted in the petitioner's Appendix at pages 1-24. (For the convenience of the Court, all citations to these opinions and to the unpublished order of the Judge of Compensation Claims shall be to the opinions and unpublished order attached as the Appendix to the petition.)

BASIS FOR JURISDICTION

This Court should not exercise jurisdiction over this case pursuant to 28 United States Code Section 1257. The judgment of the Florida Supreme Court rests on an independent and adequate state law ground. See pp. 3-4 below.

STATEMENT OF THE CASE

The opinion of the Florida Supreme Court provides a concise statement of the facts of this case. In the interest of brevity, respondents respectfully direct the Court's attention to the Appendix to the petition (App.) pages 1 and 2.

CORRECTION OF MISSTATEMENTS IN THE PETITION

The opinion of the Supreme Court of Florida sets forth the facts of this case correctly and concisely. Pursuant to United States Supreme Court Rule 15.2, respondents bring the following misstatements of facts contained in the petition to the Court's attention.

Petitioner states, "the Judge of Compensation Claims opined that the Petitioner met the definition of a disabled person under the ADA." (Petition at 4). This determination was actually made by Anita Rothard who testified by deposition as an expert in the field of vocational rehabilitation. (App. at 15 and 16). In fact, the Judge of Compensation Claims made "no specific findings as to the terms 'impairment' or 'disability' as used by the American Medical Association other than to recognize this for the purposes of helping to understand the use of these two terms." (App. at 17).

The petitioner later states, "the Supreme Court of Florida held that workers' compensation benefits were in fact terms, conditions and privileges of employment and were therefore subject to the proscriptions and prohibitions of the ADA." (Petition at 4). The Supreme Court of Florida makes no mention of terms, conditions and privileges of employment but rather holds that, "The ADA is sufficiently broad to encompass the entitlement to workers compensation benefits." (App. at 3).

REASONS FOR DENYING THE WRIT

I.

THE FLORIDA SUPREME COURT DECISION RESTS ON INDEPENDENT AND ADEQUATE STATE GROUNDS

This Court has long adhered to the principle that it will not review state court judgments that rest on adequate and independent state grounds. *Berea College v. Kentucky*, 211 U.S. 45, 53 (1903). The reasons for adherence to this policy were stated by this Court in *Herb v. Pitcairn*, 324 U.S. 117 (1945), as follows:

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions.

Id. at 125.

The judgment of the Florida Supreme Court consists of four holdings. The first is that the Americans with Disabilities Act, Title I, 42 U.S.C. §12112 (Sup. III 1991) ("ADA"), is sufficiently broad to encompass the entitlement to workers' compensation benefits. (App. at 3).

The second is that the impairment classifications of Florida Statute section 440.15(3)(b)4.d comport with the ADA because they are rationally related to the goal of compensating disabled workers for lost earnings, they provide claimants with sufficiently individualized assessments and they are not arbitrary. (App. at 3).

The third is that the ADA and the Florida Workers' Compensation Act were designed to fulfill different goals. (App. at 3).

The fourth is that petitioner failed to show a discriminatory intent or result to pursue an ADA claim. (App. at 4).

The Florida Supreme Court could have held solely that the Florida Workers' Compensation Act and the ADA were designed to fulfill different goals without reaching any significant analysis of a federal question. That holding is based on the court's construction of §440.015, Fla. Stat. 1991. (App. at 4). After determining that the statute served a different goal, the court found that none of the impermissible barriers outlined in *Griggs v. Duke Power Co.*, 401 U.S. 424, 430, 91 S.Ct. 849, 28 L.Ed. 2d 158 (1971) were imposed by the Florida Workers' Compensation Act. (App. at 4).

If none of the impermissible barriers are imposed by the statute then the statute is not violative of the ADA. Therefore the holding rests solely on the substantive state ground and is not dependent on any federal issue. Since the holding can stand on an adequate and independent state ground, jurisdiction should not be found. *Herb v. Pitcairn,* 65 S.Ct. 459, 463 (1945).

II.

THE QUESTION PRESENTED HAS NOT CREATED CONFLICTING DECISIONS AMONG THE UNITED STATES COURTS OF APPEALS

United States Supreme Court Rule 10.1(a) offers guidance as to when sound judicial discretion will allow a petition for a writ of certiorari to be granted. The Rule states the following as indicative of the special and

important reasons which may justify exercising the Court's discretionary power:

> When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

U.S.SUP.CT.R. 10.1(a)

The question presented for review has been considered in only two other reported decisions of federal courts. In *Cramer v. State,* 885 F. Supp. 1545 (M.D. Fla. 1995), Petitioner's counsel filed a class action claiming that the legislature impermissibly conditioned the duration of eligibility for wage loss on an employee's physical impairment rating. *Id.* at 1547. The federal district court ruled that the worker's compensation law provides disabled individuals with protection at least equal to the ADA and therefore is not preempted by the ADA. *Id.* at 1553. Further, it ruled that the workers' compensation law made no impermissible distinction between disabled and non-disabled individuals. *Id.* at 1553. As of this date, an appeal of *Cramer* is pending in the United States Court of Appeals, Eleventh Circuit.

In the other, a unanimous panel of the district court below expressly relied on *Cramer* to hold that petitioner

failed to show an ADA violation. *Barry v. Burdines*, 667 So.2d 241 (1st D.C.A. 1995).[1]

Petitioner has not asserted a conflict among the United States Courts of Appeals because one does not exist. The question presented has just reached the Eleventh Circuit which has yet to render its opinion and currently no other circuit has this question before it.

Aside from the guidance of SUP.CT.R. 10.1(a), the doctrine of strict necessity would weigh in the favor of allowing the lower federal courts an opportunity to address the question at hand before expending the valuable time and resources of this Court on such an untested issue.

III.

THE FLORIDA SUPREME COURT HAS NOT DECIDED A FEDERAL QUESTION IN A MANNER THAT CONFLICTS WITH ANOTHER STATE SUPREME COURT OR A UNITED STATES COURT OF APPEALS.

Another indication of the character of reasons this Court may accept as justification for exercising its discretionary power of review is stated by U.S.SUP.CT.R. 10.1(b) as follows:

> When a state court of last resort has decided a federal question in a way that conflicts with the

---

[1] Petitioners counsel has also filed an appeal of this decision in the United States Court of Appeals for the Eleventh Circuit. (Case No. 95-3047). The Eleventh Circuit granted a Motion to Stay pending the outcome of the appeal of *Cramer*. (Case No. 95-2660).

> decision of another state court of last resort or of a United states court of appeals.

As stated previously, *Cramer* is currently on appeal to the Eleventh Circuit. Moreover, it is the only case presenting the same question as the instant case that has made it to the United States Court of Appeals. Since *Cramer* has not yet been decided there can be no conflict with the Florida State Supreme court's decision in the case at hand.

Furthermore, the petitioner has not cited any cases reflecting conflict between state courts of last resort in regard to the precise question presented. In fact, state supreme courts who have ruled on similar issues negate petitioner's argument on the merits.

For example, this year the Texas Supreme Court rejected constitutional attacks against its workers' compensation law, which relies on a system of rating impairments like Florida. As to the permanent partial benefits, the court noted:

> Although debated among experts, physical impairment is one criteria for measuring benefits, and it was within the legislature's discretion to utilize this standard. At least twenty-three other states use impairment, as measured by the [American Medical Association's *Guides to the Evaluation of Permanent Impairment*] or some similar rating method, in awarding workers' compensation benefits.

Texas Workers' Compensation Comm'n v. Garcia, 893 S.W.2d 504, 522 (Tex. 1995) footnote omitted.

Other states, such as Minnesota have ruled in support of impairment ratings when attacked as being arbitrary. In *Weber v. City of Inver Grove Heights*, 461 N.W.2d 918, 919-920 (Minn. 1990) (citations omitted), the Supreme Court of Minnesota determined that the 1983 Minnesota Disability Schedule (the same schedule used in FL to determine petitioner's impairment rating) demonstrates objectivity.

> As part of the overhaul of the state workers' compensation system in 1983, the legislature authorized the Commissioner of Labor and Industry to Establish a schedule of degrees of disability arranged according to the body part impaired. The schedule was intended to avoid subjective and widely divergent impairment ratings by physicians for the same injuries, which had fostered litigation. The new schedules promote objectivity by providing a percentage figure of disability, formerly left to the discretion of the physician. The schedule was also intended to be exhaustive; over 1,700 categories of injuries are included.

Id. at 919-920; *see also Schmidt v. Modern Metals Foundry, Inc.*, 424 N.W.2d 538, 541-542 (Minn. 1988) (reporting that the 1983 amendments establishing the disability schedule represented a legitimate legislative objective "to decrease costs, avoid benefit stacking, reduce litigation, reduce the need for reliance on often conflicting medical testimony, and promote objectivity, consistency, and more uniform results in workers' compensation decisions").

Opinions such as these indicate uniformity among state supreme court decisions addressing statutory impairment rating schedules. In light of the lack of any

asserted discord among state courts of last resort or United States courts of appeals, the respondents respectfully submit that the considerations of Supreme Court Rule 10.1(b) do not justify granting the petition for a writ of certiorari.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

CHAPTER 1

FLORIDA WORKERS' COMPENSATION LAW
(As Amended 1991)

440.015 Legislative intent. – It is the intent of the Legislature that the Worker' Compensation Law be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to an injured worker at a reasonable cost to the employer. It is the specific intent of the Legislature that workers' compensation cases shall be decided on their merits. The workers' compensation system in Florida is based on a mutual renunciation of common law rights and defenses by employers and employees alike. In addition, it is the intent of the Legislature that the facts in a workers' compensation case are not to be interpreted liberally in favor of either the rights of the injured workers or the rights of the employer. Additionally, the Legislature hereby declares that disputes concerning the facts in workers' compensation cases are not to be given a broad liberal construction in favor of the employee on the one hand or of the employer on the other hand.

PART III. – JURISDICTION ON WRIT OF CERTIORARI

Rule 10. Considerations Governing Review on Writ of Certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons that will be considered:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United states court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United states court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect to a petition for a writ of certiorari

to review a judgment of the United States Court of Military Appeals.